Compounded Discrimination and the *Gonzalez v. Mexico* Case: Introducing an Anti-Essentialist Framework for Compounded Discrimination/Violence against Women Cases at the Inter-American Court of Human Rights

by

Beth Allison Spratt

A thesis submitted in conformity with the requirements for the degree of
Master of Laws
Graduate Department of the Faculty of Law
University of Toronto

Your file Votre référence
ISBN: 978-0-494-76655-2

Our file Notre référence
ISBN: 978-0-494-76655-2

Compounded Discrimination and the *Gonzalez v. Mexico* Case: Introducing an Anti-Essentialist Framework for Compounded Discrimination/Violence against Women Cases at the Inter-American Court of Human Rights

Beth Allison Spratt

Master of Laws

Graduate Department of the Faculty of Law

University of Toronto

2011

Abstract

In *Gonzalez et al. v. Mexico*, a case decided by the Inter-American Court of Human Rights in 2009, a context of discrimination and violence against women was known to target particular subgroups of women, of which the claimants were constituent, distinguished *inter alia* by their age, socioeconomic and, in some cases, migrant status. Despite this, the judgment of the Inter-American Court focused almost exclusively on *sex* discrimination and violence against women as a broader social phenomenon. With this judgment forming the background for the critique, the author will develop an anti-essentialist framework for the analysis of discrimination and violence against women claims where the discrimination was compounded by various identity factors. Intended to assist the Inter-American Court with its articulation of norms and standards in such cases, the ultimate value of this framework should be measured in terms of the assistance it can offer the Court at the reparations stage.

Acknowledgements

I would like to express my immense gratitude to my supervisor, Professor Rebecca J. Cook, for providing me with invaluable assistance and advice throughout the past year.

I would also like to thank my family and friends for their support and encouragement. In particular, I wish to thank my wonderfully supportive and loving partner, best friend, and confidante, Susana Romero Orellana, for her constant encouragement, her faith in this project, and for inspiring me every day. You have taught me that our best motivator is love and, for me, this project was a labour of love. I would also like to thank my mother, Patricia White, for always being on my cheerleading squad, and for encouraging me to be bold.

Table of Contents

1 Introduction.....1

2 Introduction to the Case Study in Question: Violence against Women in *Ciudad Juárez*, Mexico and the *Gonzalez v. Mexico* Case.....2

3 Inter-American Law on Discrimination and Violence against Women.....3

3.1 Introduction.....3

3.2 The American Convention and Discrimination/ Violence against Women.....4

3.3 The Belém Convention and Discrimination/Violence against Women.....5

3.4 State Responsibility for Violence against Women.....8

4. Building the Case for an Anti-Essentialist Framework for Cases of Compounded Discrimination/Violence against Women in the Inter-American System.....9

4.1 Introduction: The Anti-Essentialist Critique ofInternational Anti-Discrimination and Violence against Women Law.....9

4.2 Applying Anti-Essentialist Critiques to Inter-American Law: Addressing an Important Concern.....12

4.3 The Case for an Anti-Essentialist Approach to Discrimination/Violence Against Women Claims in the Inter-American Human Rights System.....15

5 An Anti-Essentialist Framework for Compounded Discrimination/Violence against Women Cases at the Inter-American Court.....18

6 Applying the Anti-Essentialist Framework to *Gonzalez v. Mexico*.....28

6.1 Introduction.....28

6.2 Situating the Subjects at the Centre of the Discrimination/Violence against Women Analysis.....29

6.3 Identifying the Compounded Stereotype and its Discriminatory.....35

6.4 Examination of the Multiple Systems of Oppression Experienced by the Subjects.....39

7 Fashioning Remedies through the Lens of the Anti-Essentialist Framework.....42

7.1 A Critique and Re-fashioning of One Reparation Order From *Gonzalez v. Mexico*.....42

8 Conclusion.....45

Compounded Discrimination and the *Gonzalez v. Mexico* Case: Introducing an Anti-Essentialist Framework for Compounded Discrimination/Violence against Women Cases at the Inter-American Court of Human Rights

1 Introduction

> Clearly, the category of women is internally fragmented by class, color, age, and ethnic lines, to name but a few; in this sense, honouring the diversity of the category and insisting upon its definitional non-disclosure appears to be a necessary safeguard against substituting a reification of women's experience for the diversity that exists.[1]

This paper will examine and bring an anti-essentialist critique to the discrimination and violence against women analysis in the case of *Gonzalez et al.("Cotton Field") v. Mexico*[2] [hereinafter "*Gonzalez v. Mexico*"], a case decided by the Inter-American Court of Human Rights [hereinafter the "Inter-American Court" or the "Court"] in 2009. In *Gonzalez v. Mexico* a context of discrimination and violence against women was known to target particular subgroups of women, of which the claimants were constituent, distinguished *inter alia* by their age, socioeconomic and, in some cases, migrant statuses. Despite this, the judgment of the Inter-American Court focused almost exclusively on *sex* discrimination and violence against women as a broad social phenomenon. With this judgement forming the backdrop, this paper will engage critically with the question: how can anti-essentialist theories be engaged with in meaningful ways to assist the Inter-American Court with the discrimination and violence against women analysis in cases where discrimination is compounded by various identity factors (the phenomenon known as "compounded discrimination")? Building on an anti-essentialist critique, the author will endeavour to develop an analytical framework through which compounded discrimination cases might be analysed in the future. This framework will then be used to draw out the limitations of the Court's approach in *Gonzalez v. Mexico*, while demonstrating how its application to the facts in that case could have assisted the Court with various aspects of the analysis. The

[1] Judith Butler, *Gender Trouble, Feminist Theory, and Psychoanalytic Discourse*, in Feminism/Postmodernism at 327 (Linda J. Nicholson ed., 1990) cited in Johanna E. Bond, "International Intersectionality: A Theoretical and Pragmatic Exploration of Women's International Human Rights Violations" (2003) 52 Emory L.J. 71 at 133 [hereinafter *International Intersectionality*].

[2] *Gonzalez et al.("Cotton Field") v. Mexico* (2009) Inter-American Court of Human Rights [hereinafter *Gonzalez*].

ultimate value of this framework will be measured in terms of the assistance it can offer the Court at the reparations stage in such cases. Thus, final substantive section of this paper will contend with the matter of fashioning remedies through the lens of the proposed framework.

2 Introduction to the Case Study in Question: Violence against Women in *Ciudad Juárez*, Mexico and the *Gonzalez v. Mexico* Case

The Inter-American Court's judgment on the merits in *Gonzalez v. Mexico* dealt with the state of Mexico's alleged international responsibility for the disappearances and deaths of three women: Mss. Claudia Ivette González, Esmeralda Herrera Monreal and Laura Berenice Ramos Monárrez under the American Convention and the Belém Convention. All three women were murdered in a context of extreme violence in *Ciudad Juárez* (Juárez City hereinafter "Cuidad Juárez"), their bodies found in a cotton field there in November, 2001.

The Court identified the following as some of the relevant contextual facts in this case. Ciudad Juárez is a border town in the State of Chihuahua, Mexico. It is identified primarily as an industry city, in which the *maquila* [manufacturing or assembly plants] industry flourished.[3] The Court also identified Ciudad Juárez as a "place of transit" for foreign and Mexican migrants.[4] The proximity of the U.S. border had attracted various types of organized crime to the region, which had contributed to the increased levels of violence in the city.[5]

From 1993, the levels of violence against women and girls in Juárez City began to increase exponentially. According to the Inter-American Commission, as quoted by the Court: "[Ciudad] Juárez has become a focus of attention of both the national and the international communities because of the particularly critical situation of violence against women which has prevailed since 1993, and the deficient State response to these crimes."[6] According to the Special Rapporteur, the situation of women in Juarez is anomalous because: "(i)

[3] *Gonzalez, supra* note 2 at 113.
[4] *Gonzalez, ibid*.
[5] *Gonzalez, ibid.*
[6] *Gonzalez, ibid.* at 114.

murders of women increased significantly in 1993; (ii) the coefficients for murders of women doubled compared to those for men; and (iii) the homicide rate for women in Ciudad Juárez is disproportionately higher than that for other border cities with similar characteristics."[7] The Court also took note that different reports established that the murder victims in Juárez were mainly young women, including girls, workers, underprivileged, students, or migrants.[8]

Furthermore, the Court detailed evidence regarding the continuing failure on the part of the State to investigate and solve the cases of the murders of the women of Juarez.[9] In this regard, the Court referred to the report of the Commission's Inter-American Special Rapporteur on the Rights of Women [hereinafter the "Special Rapporteur - Women"] which concluded that "the vast majority of the murders remained in impunity"[10], and further noted a UN report that cited delays and irregularities with the investigations into the murders. [11] The Court went on to note various sources that indicated that a "context of gender-based discrimination had an impact on the way state officials responded to the crimes."[12]

3 Inter-American Law on Discrimination and Violence against Women

3.1 Introduction

At this stage, it will be useful to set out the basic human rights law and principles applicable to the issue of discrimination and violence against women in the Inter-American System. The regional binding human rights treaties relevant to this issue include the American Convention on Human Rights [hereinafter the "American Convention" or the "Convention"] and the Inter-American Convention on the Prevention, Punishment and

---

[7] *Gonzalez, supra,* note 2 at 117.
[8] *Gonzalez, ibid.* at 123.
[9] *Gonzalez, ibid.* at 157-158.
[10] Inter-American Commission on Human Rights, *The Situation of the Rights of Women in Ciudad Juárez, Mexico: The Right to be Free from Violence and Discrimination,* OEA/Ser.L/V//II.117, Doc. 44, March 7, 2003 [hereinafter *Commission Report – Juárez*] cited in *Gonzalez, supra* note 2 at 158.
[11] United Nations, *Report of the mission of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, E/CN.4/2000/3, Add.3, November 25, 1999 cited in *Gonzalez, supra* note 2 at 153.
[12] *Gonzalez, ibid.* at 153.

Eradication of Violence Against Women [hereinafter the "Belém Convention"]. Binding principles of equality and non-discrimination and the human rights of women are central issues at the core of the Inter-American human rights system. It has been noted that "the priority granted by the [Inter-American] Commission and its Rapporteur to protect the rights of women … reflects the importance given to this area by the Member States themselves."[13]

3.2 The American Convention and Discrimination/Violence against Women

The American Convention is a treaty within the Inter-American System that allows for the processing of petitions, based on alleged State Party violations of its provisions, to the Inter-American Commission on Human Rights [hereinafter the "Inter-American Commission" or the "Commission"], which may, in contentious cases, refer the case to the Inter-American Court. Under the American Convention, as with most other international human rights conventions, it is the State through which human rights principles must be "conveyed, channelled and challenged."[14] Article 1(1) of the American Convention obligates State Parties to both *respect* and *ensure* the rights in the Convention *without discrimination* based on "race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition."[15] Article 1(1), in correlation with the rights guaranteed in the treaty, such as in Articles 4 (Right to Life), create a positive obligation on a State Party to both respect and ensure the right without discrimination. Furthermore, Article 24 provides that:

> All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.[16]

---

[13] Inter-American Commission on Human Rights, *Violence and Discrimination Against Women in the Armed Conflict in Colombia*, OEA/Ser.L/V/II., Doc. 67, October 18, 2006 [hereinafter *Colombia Report*] at 8.
[14] Penelope Andrews, "Making Room for Critical Race Theory in International Law: Some Practical Pointers" (2000) 45 Villanova Law Review 855 [hereinafter *Making Room*] at 861.
[15] Organization of American States, *American Convention on Human Rights*, "Pact of San Jose", Costa Rica, 22 November 1969 [hereinafter *American Convention*] at Art. 1(1).
[16] *American Convention*, *ibid.* at Art. 24.

In *Gonzalez v. Mexico*, the Court found that violence against women constituted a form of discrimination in violation of Article 1(1) of the Convention in relation to the Mexico's obligation to guarantee a number of important rights in the Convention, including the Right to Life.[17]

3.3 The Belém Convention and Discrimination/Violence against Women

> [V]iolence against women constitutes a violation of their human rights and fundamental freedoms, and impairs or nullifies the observance, enjoyment and exercise of such rights and freedoms[18]

The Belém Convention is a specialized treaty within the Inter-American System covering the prevention, punishment and eradication of violence against women. The Belém Convention allows for the processing of petitions based on violations of its Article 7 to the Inter-American Commission[19], which may then refer the case to the Inter-American Court.[20] The Court has clarified that the purpose of the petition system under the Belém Convention, pursuant to Article 12 thereof, is to "enhance the right of international individual petition, based on certain clarifications concerning the scope of the gender approach."[21]

Article 1 of the Belem Convention defines violence against women as "any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere."[22] In addition, this Convention recognizes the relationship between gender violence and discrimination.[23] Article 7 sets out the actionable State Party obligations in reference to violence against women. It is relevant, for our purposes, to set out Article 7(b):

---

[17] *Gonzalez, supra* note 2 at 402.
[18] Organization of American States, *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ("Convention of Belém do Para"),* 9 June 1994 [hereinafter *Belém Convention*] at Preamble.
[19] *Belém Convention*, *ibid.* at Art. 12.
[20] *Gonzalez, supra* note 2 at 48.
[21] *Gonzalez, ibid.* at 61.
[22] *Belém Convention, supra* note 18 at Art. 1(1).
[23] *Belém Convention, ibid.* at Art. 6(a).

> The States Parties condemn all forms of violence against women and agree to pursue, by all appropriate means and without delay, policies to prevent, punish and eradicate such violence and undertake to:
>
> b. apply due diligence to prevent, investigate and impose penalties for violence against women[24]

The Belém Convention is a remarkable treaty for a number of reasons. First, it sets out women's *right* to be free from violence, going further, even, than the language in the United Nations Declaration on the Elimination of Violence against Women [hereinafter the "DEVAW"] , which recognizes violence against women only as a 'barrier' to their enjoyment of human rights, and not as a *violation* of their human rights *per se*.[25] In contrast with the DEVAW, Articles 3 and 4 of the Belém Convention explicitly recognize women's "right to be free from violence in both the public and private spheres"[26] and "right to have her physical, mental and moral integrity respected"[27], respectively, amongst other rights related to the issue of violence against women. This is an important difference. While the DEVAW's approach ultimately conceives of remedies like special measures for women's protection against violence[28], the language of the Belém Convention is rights-based and, therefore, affirmative, adopting this right as a universal human right. As Dianne Otto points out, the language of the DEVAW leaves its subjects "needing special measures for their protection rather than human rights."[29] This focus on the "victims" under the DEVAW has, at times, actually "justif[ied] the denial of women's enjoyment of human rights."[30] Since rights are affirmative, the language in the Belém Convention empowers women subjects with the entitlement to have violations of their human rights redressed.

---

[24] *Belém Convention supra,* note 18 at Art. 7(b).
[25] Dianne Otto, "Lost in Translation: Re-scripting the Sexed Subjects of International Human Rights Law," in Anne Orford, ed., *International Law and its Others* (Cambridge: Cambridge University Press, 2006) 318 [hereinafter *Lost in Translation*] at 346.
[26] *Belém Convention, supra* note 18 at Art. 3.
[27] *Belém Convention, ibid.* at Art. 4.
[28] *Lost in Translation, supra* note 25 at 346.
[29] *Lost in Translation, ibid.*
[30] Ratna Kapur, "Tragedy of Victimization Rhetoric: Resurrecting the "Native" Subject in International/Post-Colonial Feminist Legal Politics" (2002) 15 Harv. H.R.J. 1 [hereinafter *Tragedy*] at 6-7 cited in *Lost in Translation, ibid*.

Second, the Belém Convention is remarkable for its explicit recognition of women of intersecting identities. Article 9, though not directly actionable, provides that State Parties must, with respect to the measures outlined in that Chapter (including those outlined in Article 7) take special account of the situation of vulnerability to violence that certain groups of women can be exposed to. Article 9 states:

> With respect to the adoption of the measures in this Chapter, the States Parties shall take special account of the vulnerability of women to violence by reason of, among others, their race or ethnic background or their status as migrants, refugees or displaced persons. Similar consideration shall be given to women subjected to violence while pregnant or who are disabled, of minor age, elderly, socioeconomically disadvantaged, affected by armed conflict or deprived of their freedom.[31]

The issue of what I will term "multiple systems of oppression", an issue which is engaged with, in part, in this Article, will be discussed in greater detail, below, as part of the proposed Anti-Essentialist Framework for analysing compound discrimination/violence against women cases. At this point it is relevant merely to point out how this provision in the Belém Convention provides for explicit recognition of how various relevant identity traits can expose women to particular forms of violence or increased vulnerability to violence.

Pursuant to Article 12, the Court has subject-matter jurisdiction over only violations of Article 7 of the Belém Convention. Indeed, in *Gonzalez v. Mexico*, the Court confirmed that it does not have contentious jurisdiction *rationae materiae* over violations of Articles 8 and 9[32] unfortunately leaving both outside of the contentious subject-matter jurisdiction of the petition system for both the Inter-American Commission and Court.

Despite this, the Court also indicated that this finding did not exclude the fact that these articles could be used to interpret that and "other pertinent Inter-American instruments."[33]

---

[31] *Belém Convention, supra* note 18 at Art. 9.
[32] See *Gonzalez, supra* note 2 at 79.
[33] *Gonzalez, ibid.*

Furthermore, pursuant to the Vienna Convention on the Law of Treaties, provisions of a treaty should generally be interpreted consistently with the text of that treaty.[34]

Finally, it is important to note that the Belém Convention does not specifically require the Court to interpret State Party's Article 7 due diligence obligations according to an essentialistic view of women's identity. As will be argued in more detail, below, even without the specific language set out in Article 9 of the Belém Convention, women's identities, and thus their experiences, are not static, and thus the provisions set out in Article 7 cannot be successfully and completely implemented without considering the multiple forms of discrimination certain groups of women can experience that lead to violence against them. Indeed, the Special Rapporteur - Women illustrated this point well in her report "Violence and Discrimination against Women in the Armed Conflict in Colombia" [hereinafter the "Colombia Report"] and, further, demonstrated how Article 9 can be used to interpret the obligations arising out of Article 7:

> The Convention of Belém do Pará stipulates that when a State acts with due diligence [a requirement pursuant to Article 7(b)], it should take special account of the vulnerability to violence that may affect women on the basis of their race and ethnicity, among other risk factors. Through [Article 9,] States acknowledge that discrimination, in its different manifestations, does not always affect all women to the same degree. There are women who are particularly exposed to the infringement of their rights and to suffer discrimination on the basis of more than one factor.[35]

3.4 State Responsibility for Violence against Women

State responsibility for violence against women is established in both the American Convention and the Belém Convention. Article 1(1) of the American Convention establishes that states have the obligation to *respect* and *ensure* the rights set out in that Convention.[36] As part of the obligation to ensure, State Parties are under a legal obligation "to prevent human rights violations and to and to [sic] use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate

---

[34] United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331 at Art. 31(2).
[35] *Colombia Report, supra* note 13 at vii.
[36] *American Convention, supra* note 15 at Art. 1(1).

punishments on them, and to ensure the victim adequate compensation."[37] In *Gonzalez v. Mexico*, the Court ultimately found that Mexico's responsibility for violating this obligation was directly linked, *inter alia*, to its failure to take appropriate measures to investigate the deaths of the applicants.[38]

State duties in relation to violence against women are well explicated in the Belém Convention. Similar to Article 1(1) of the American Convention, under the Belém Convention's actionable Article 7, the State has a duty to "refrain from engaging in any act or practice of violence against women and to ensure that their authorities, officials, personnel, agents, and institutions act in conformity with this obligation."[39] The duty to ensure is further explicated in the duty set out in Article 7(b) to: "apply due diligence to prevent, investigate, and impose penalties for violence against women."[40]

4 Building the Case for an Anti-Essentialist Framework for Cases of Compounded Discrimination/Violence against Women in the Inter-American System

4.1 Introduction: The Anti-Essentialist Critique of International Anti-Discrimination and Violence against Women Law

Inter-American anti-discrimination and violence against women law was largely founded in principles established at international human rights law, such as those established in the Universal Declaration on Human Rights [hereinafter the "UDHR"]. The approach to anti-discrimination - largely rooted in Western equality law doctrine[41] - saw discrimination as happening to monolithic and static categories of people, who the law could identify as victims of discrimination only if the actor - at international law, the State Party - failed to respect or ensure their human rights based on their association with *one* of the following categories: race, colour, sex, language, religion, political or other opinion, national or social

[37] *Factory at Chorzów* (Merits), 1928 PCIJ (Ser. A) No. 17 at 29 (13 September) cited in Jo M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights*, (Cambridge: Cambridge University Press, 2003) [hereinafter *Inter-American Court*] at 230.
[38] *Gonzalez, supra* note 2 at 389.
[39] *Belém Convention*, *supra* note 18 at Art. 7(a)
[40] *Belém Convention, ibid.* at Art. 7(b)
[41] See *International Intersectionality, supra* note 1.

origin, property, birth or other status.[42] Indeed, this static understanding of identity dates back to an "unqualified embrace of universalism" [43] rooted in the very foundations of international human rights law that, for example, treated discrimination against women as a universal phenomenon, experienced in much the same way by women the world over. Many feminist activists were also part of this development. According to Tracey Higgins, "(m)uch feminist activism on the international level has been premised on two assumptions, both of which may be characterized as essentialist: first that women share types of experiences and are oppressed in particular ways as women; and second, that these experiences are often different than those of men."[44]

In the 1980s and 90s, various legal theorists in certain domestic contexts – particularly in the U.S. – began to critique, at the domestic level, this universalistic and essentialistic approach to women's and other's experiences of discrimination; targeting their domestic legislation and jurisprudence, as well as Western feminist legal theory and anti-racism politics in the U.S.[45] This critique developed out of the traditions of Critical Race Theory and Critical Race Feminism [hereinafter "CRTs"], amongst other theoretical traditions, which were tireless in their critiques of the law's tendency to essentialize identity and, in part for that reason, its failure to translate formal legal rights into substantive equality.[46] Angela Harris, a leading CRT theorist, defined gender essentialism as "the notion that there is a monolithic 'women's experience' that can be described independently of other facets of experience like race, class, and sexual orientation"[47] and points out further that "[a] corollary to gender essentialism is 'racial essentialism' – the belief that there is a

---

[42] United Nations General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III) at Art. 2.
[43] *International Intersectionality*, *supra* note 1 at 79-80.
[44] Tracey E. Higgens, "Anti-Essentialism, Relativism, and Human Rights" (1996) 19 Harv. Women's L.J. 89 at 100 cited in *International Intersectionality, ibid.* at 80.
[45] See e.g. Kimberlé Crenshaw, "Demarginalizing the Intersection of Race and Sex: a Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" (1989) U. Chi. Legal F. 139 [hereinafter *Demarginalizing*].
[46] *Making Room, supra* note 14 at 865-866.
[47] Angela P. Harris, "Race and Essentialism in Feminist Legal Theory" in Adrien Katherine Wing, ed., *Critical Race Feminism: A Reader* (New York: New York University Press, 1997) 11 [hereinafter *Race and Essentialism*] at 11.

monolithic 'black experience' or chicano experience.'"[48] These U.S scholars argued that, for women, this essentialism has meant that the white, middle-class (heterosexual etc.) experience has been elevated to the norm, making theirs the prototypical experience of women[49] and excluding the experiences of women who did not fit into that "norm". Discrimination based in a combination of sex/gender and other grounds such as race or sexuality fell outside of this prototype and became something else, unrecognizable as a discrete form of discrimination under equality law provisions. As CRT theorist Kimberlé Crenshaw explained:

> Because women of color experience racism in ways not always the same as those experienced by men of color and sexism in ways not always parallel to experiences of white women, antiracism and feminism are limited, even on their own terms.[50]

Many theorists described the experience of racialized women who often fell through the cracks of single-category anti-discrimination law, their claims not recognized as racism *or* sexism, since both were defined in terms of the most privileged groups in each category. Thus, the specific ways in which a law or practice might discriminate against racialized women would be lost entirely on a court of law.[51]

The thrust of the anti-essentialist critique, therefore, is that "identity cannot be reduced to an essence that is so central to an individual's being that it precludes other categories of analysis along the axes of race/ethnicity, gender, class, religion, and sexual orientation"[52] to name but a few legally cognizable identity categories for discrimination law purposes. Instead, the tendency to essentialize women's experiences has failed to account for the "experiences of women who suffer discrimination based on multiple systems of oppression operating simultaneously, such as racism, classism, ethnocentrism, sexism and

---

[48] *Race and Essentialism, ibid.*

[49] Trina Grillo, "Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House *Symposium: Looking to the 21st Century: Under-Represented Women and the Law*" (1995) 10 Berkeley Women's L.J. 16 [hereinafter *Anti-Essentialism and Intersectionality*] at 19.

[50] Kimberlé Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color" in Kimberlé Crenshaw, Neil Gotanda et al., eds., *Critical Race Theory: The Key Writings that Formed the Movement* (New York: The New Press, 1995) [hereinafter *Mapping*] at 360.

[51] See generally *Demarginalizing, supra* note 45.

[52] *International Intersectionality, supra* note 1 at 109.

heterosexism."[53] As one CRT theorist explained, in the context of violence against women, this conflation of intragroup difference is particularly problematic "because the violence that many women experience is often shaped by other dimensions of their identities, such as race and class."[54]

The challenge anti-essentialism presents to anti-discrimination and violence against women analyses, at both the domestic and international spheres, then, is to bring together all relevant and legally cognizable identity traits in a single, though complex, discrimination analysis. As Trina Grillo, a leading CRT theorist pointed out:

> In the end the anti-essentialist and intersectionality critiques ask only this: that we define complex experiences as closely to their full complexity as possible and that we not ignore voices at the margin. The fact is, the choice with which we seem to be presented is either to accept a white, middle-class woman's view of the world or to talk explicitly about different types of women.[55]

As we will see, the very process of taking an anti-essentialist approach to discrimination claims serves to dismantle the "prototype" of woman Grillo refers to above, and to debunk the myth that sexism and racism, for example, can be treated separately and as discrete forms of discrimination. Instead, an anti-essentialist approach exposes how the complexity of identity is relevant to the discrimination analysis and, in particular for our purposes here, to the discrimination analysis in cases of violence against women.

4.2 Applying Anti-Essentialist Critiques to Inter-American Law: Addressing an Important Concern

One concern must be addressed before proceeding to apply these critiques to Inter-American anti-discrimination and violence against women law. That is: would applying these anti-essentialist critiques, developed largely in and out of a Western or global North context to the Inter-American System not simply entail further Western imposition of the kind the international human rights project ought be wary? In response to this concern, I will posit the following observations.

---

[53] *International Intersectionality, ibid.* at 80.
[54] *Mapping, supra* note 50 at 357.
[55] *Anti-Essentialism and Intersectionality*, *supra* note 49 at 22.

From the beginning, the international human rights law construct was heavily rooted in and influenced by Western human rights ideals and norms, including and especially, those developed in the U.S. Tayyab Mahmud explains that international legal categories, the developments of which were largely dominated by Western states, were then transferred to the colonies.[56] Indeed, both the benefits and the limitations of Western human rights norms have been largely replicated in international human rights constructs. As one scholar explains:

> Looking at the origins of rights in international law, in which a traditional time line identifies the late eighteenth century as the time of the emergence of the (aptly named) rights of man – times when political and social uprisings sought to identify those impermissible governmental intrusions into individual rights as symbolized and personified in the American Declaration of Independence and the French Declaration of Les droits de l'homme – reveals that such rights movements' apologees coexist with slavery and women being mere chattel.[57]

As she does, I would argue that though this is not necessarily fatal to it as a project, it does provide us with a duty to improve upon it, for example, by removing the intrinsic relations of domination that characterize it.[58]

Regarding international law's approach to women's equality, specifically, one scholar explains that the structure of the early treaties and, in particular, the UDHR, which was largely replicated in other international treaties, brought about a reinvigoration of marginalized female subjectivities.[59] However, in so doing, they also adopted into international law an imperialist and Western feminist approach to women's rights, in part by adopting as a "universal subject" women that "bear the characteristics of privileged race, class and sexuality groups."[60] Thus, the essentialist approach to identity, so critiqued by the

---

[56] Tayyab Mahmud, "International Law and the "Race-ed" Colonial Encounter" in Carrasco, Enrique R., Chair, "Implementation, Compliance and Effectiveness: International Dimensions of Critical Race Theory", (1997) 91 Am. Soc'y Int'l L. Proc. 408 at 417.
[57] Berta Esperanza Hernandez-Truyol "Race, Sex and Human Rights: A Critical Global Perspective" in Carrasco, Enrique R., Chair, "Implementation, Compliance and Effectiveness: International Dimensions of Critical Race Theory", (1997) 91 Am. Soc'y Int'l L. Proc. 408 [hereinafter *Critical Global Perspective*] at 411.
[58] *Critical Global Perspective, ibid.*
[59] *Lost in Translation, supra* note 25 at 335-337.
[60] *Lost in Translation, ibid.* at 334-335.

anti-essentialist movements in the U.S. domestic law context, was also largely replicated at international human rights law.

Of central importance here, is the fact that this "international recognition and valuation of difference echoes sentiments expressed by feminists in the global South for decades."[61] Indeed, Johanna E. Bond details in her paper "International Intersectionality: A Theoretical and Pragmatic Exploration of Women's International Human Rights Violations" what she calls the "parallel development of anti-essentialism in U.S. discourse and in global critiques of the "international sisterhood" originating primarily in the Global South."[62] Indeed, both anti-essentialist theories out of the U.S. and anti-subordination theories out of the Global South "refute the notion that identity or the human "self" can be reduced to a natural or socially constructed "essence"."[63] According to Bond:

> The evolution of feminist theory, critical race theory and critical race feminism in the United States demonstrates how postmodernism has challenged static understandings of the self, such as the ones most commonly accepted within international human rights dialogues. Similarly feminists in the global South have argued that the universal notions of "womanhood," often invoked in the struggle for women's human rights around the world, have reflected the relatively privileged experience of women in the global North.[64]

Furthermore, she points out that:

> Many writers from the global South have demonstrated the limitations of modernity and have relied instead on communitarian values to frame their rights-based struggles. Although some of these critiques maintain an essentialist framework, many have assumed an anti-essentialist approach that emphasizes multiple systems of oppression operating along the axes of race, ethnicity, religion, gender, class and sexual orientation.[65]

Thus, it is proposed that the anti-essentialist critique, which has its roots in theoretical traditions in both the global North and the global South, and is, itself, an attempt to overcome manifestations of hegemonic power relations in the law, may be used in ways to

---

[61] *International Intersectionality, supra* note 1 at 74.
[62] *International Intersectionality, ibid.* at 102.
[63] *International Intersectionality, ibid.* at 76.
[64] *International Intersectionality, ibid.* at 103.
[65] *International Intersectionality, ibid.* at 102.

improve upon the existing international human rights framework, while avoiding the imposition of further dominance.

4.3 The Case for an Anti-Essentialist Approach to Discrimination/Violence against Women Claims in the Inter-American Human Rights System

How does an anti-essentialist approach fit into the human rights paradigm in the Inter-American System? First, I will posit that an anti-essentialist approach is appropriate for discrimination and violence against women analysis at international law, generally. Indeed, it is well recognized at international law that human rights are indivisible and interdependent, a notion that largely parallels anti-essentialist ideas of indivisibility of self, or "that a person may be subject to human rights violations based simultaneously on various facets of her identity."[66] Just as human rights, such as the right to life or freedom of expression, are indivisible, and therefore, cannot be privileged or prioritized one over another, and interdependent, so too does an anti-essentialist approach to identity "resist[] privileging gender, race, sexual orientation, or any other identifying characteristic as the single focal point of political action."[67]

In the Inter-American System, specifically, one answer to how an anti-essentialist approach fits into the human rights paradigm there concerns the issue of adequate reparations. There are two purposes behind reparations at international law. First, they are intended to ensure State Parties observe a required standard of law and order and, second, they are used to "repair, to the extent possible, any injuries caused as a result of a State's failure to meet those standards."[68] It is with this second purpose that I am most concerned here.

When a State Party is found to be in violation of the American Convention, the Convention mandates the ordering of reparations according to Article 63(1). This article essentially codifies the basic principles of international reparations law, cited above, providing that:

---

[66] *International Intersectionality, supra* note 1 at 153.
[67] *International Intersectionality, ibid.* at 153.
[68] Marjorie Whiteman, *Damages in International Law*, at 23-4 (Government Printing Office, Washington DC, 1937) cited in *Inter-American Court, supra* note 37 at 231.

> If the Court finds that there has been a violation of a right or freedom protected by this Convention the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured parties.[69]

According to Jo M. Pasqualucci, the legislative history of this provision indicates a decisive shift from a narrow definition of reparations providing for merely compensatory reparations[70], to one which now allows the Court to order: "(t)hat the consequences of the decision or measure that has impaired those rights be stopped; (t)hat the injured party be guaranteed the enjoyment of his violated right or freedom, and (t)he payment of just compensation to the injured party."[71] In this regard, beyond the use of large monetary damage awards, the Inter-American Court has become known for its creative non-monetary remedies.[72]

Pursuant to Article 63(1) then, and central for our purposes here, the Court must order, where appropriate, that measures be taken to remedy the consequences of a human rights violation. While in the past the focus of these remedies has been on the "injuries that had already been caused to the individual victim by the violation"[73], the law has developed to include in the "remedy of the consequences of the violation a duty to deter future violations."[74] Thus, the Court has taken the position that, in some cases, adequate reparation includes, where and to the extent possible, that future violations be deterred. Orders focussed on remedying the consequences of a human rights violation include, but

---

[69] *American Convention*, *supra* note 15 at Art. 63(1).
[70] Organization of American States, *Draft American Convention on Protection of Human Rights*, OAE/Ser.L/II.19doc. 48 (English) rev. 1 (2 October 1968) at Art. 52(1) reprinted in Buergenthal and Norris (eds.), *Human Rights: The Inter-American System*, booklet 13, vol. 2, at 1, 20 cited in *Inter-American Court, supra* note 37 at 233.
[71] Organization of American States, *Observations by the Governments of the Member States on the Draft Inter-Amercian Convention on Protection of Human Rights: Guatemala*, OEA/Ser.K/XVI/1.1doc.24 (English) (8 November 1969), reprinted in Buergenthal and Norris (eds.), *Human Rights: The Inter-American System*, Booklet 13, vol. 2, at 119, 132 cited in *Inter-American Court, supra* note 37 at 234.
[72] William Paul Simmons "Remedies for the Women of Ciudad Juárez through the Inter-American Court of Human Rights" (2006) 4 Northwestern Journal of International Human Rights 492 [hereinafter *Remedies for Women of Ciudad Juárez*] at 504.
[73] *Inter-American Court, supra* note 37 at 242.
[74] *Inter-American Court, ibid.* at 242.

are not limited to, orders that the State: punish the perpetrators of a violation, adopt, amend or repeal laws, apologize, pay material damages (including in the reallocation of economic resources to housing, education, health care or employment), pay moral damages, and/or take action or refrain from taking action.[75]

The Court, itself, commented on this goal of deterring future human rights violations in the context of structural discrimination and violence against women in its judgment in *Gonzalez v. Mexico*, explaining that:

> bearing in mind the context of structural discrimination in which the facts of this case occurred … the reparations must be designed to change this situation, so that their effect is not only of restitution, but also of rectification. In this regard, reestablishment of the same structural context of violence and discrimination is not acceptable.[76]

Thus, the Court has signalled that, in cases where structural discrimination is found, reparations should be aimed at changing the structural context that led to the violence and discrimination in the first place. This kind of plan for the deterrence of future human rights violations largely parallels the fostering of what Rebecca J. Cook and Simone Cusack call "transformative equality"[77] – or the transformation of discriminatory societal structures that underpin this particular human rights violation.

An anti-essentialist approach is proposed to facilitate both recognition of the discriminatory structures in cases of compounded discrimination and, in turn, the crafting of truly adequate remedies, targeted at identifying and eradicating such structures. As will be explored in greater detail, below, discrimination finds its roots in the underlying societal attitudes (stereotypes/prejudice) and structures (oppressive power relations) that form the "structural context of violence and discrimination" [78] the Court refers to, above. In compounded discrimination cases, attitudes and structures such as stereotyping and oppressive power relations are complex. An anti-essentialist approach is specifically designed to take account

---

[75] *Inter-American Court, supra* note 37 at 242.
[76] *Gonzalez, supra* note 2 at 450.
[77] Rebecca J. Cook and Simone Cusack, *Gender Stereotyping: Transnational Legal Perspectives*, (Pennsylvania: University of Pennsylvania Press, 2010) [hereinafter *Gender Stereotyping*] at 8.
[78] *Gonzalez, supra* note 2 at 450.

of that complexity and identify and unravel those structures and how they harmed or discriminated against the claimants in such cases. Understanding how various factors enabled or perpetuated discrimination against different groups of women in various contexts, can provide the Court with the right tools to dismantle and eradicate them.[79] As the U.N. Committee on the Status of Women pointed out in their "2001 Agreed Conclusions on Gender and All Forms of Discrimination, in Particular Racism, Racial Discrimination, Xenophobia, and Related Intolerance":

> There has been growing recognition that various types of discrimination do not always affect women and men in the same way. Moreover, gender discrimination may be intensified and facilitated by all other forms of discrimination. It has been increasingly recognized that without gender analysis of all forms of discrimination, including multiple forms of discrimination, and, in particular, in this context, racial discrimination, xenophobia, and related intolerance, violations of the human rights of women might escape detection and remedies to address racism may fail to meet the needs of girls and women.[80]

5 An Anti-Essentialist Framework for Compounded Discrimination/Violence against Women Claims at the Inter-American Court

When faced with cases in which applicants claim discrimination on more than one ground, it is important for the Inter-American Court to approach the analysis with various considerations in mind. First, it is necessary to put the victim's identity characteristics at the forefront of the analysis. This means that "the focus of the analysis should be the site of intersecting systems of oppression or intersecting human rights violations."[81] For example, under the CRT approach, African-American women are placed at the centre of the analysis, so that neither race nor gender can be privileged in the analysis.[82] When making a claim pursuant to Article 1(1), the Commission and the applicants would be required to tie the alleged discrimination back to the enumerated or analogous and, thus, legally cognizable,

---

[79] See *Gender Stereotyping, supra* note 77 at 174.
[80] United Nations Committee on the Status of Women, *Agreed Conclusions on Gender and all forms of Discrimination, in Particular Racism, Racial Discrimination, Xenophobia and Related Intolerance* 45th Session at 5 cited in *International Intersectionality, supra* note 1 at 143-144.
[81] *International Intersectionality, ibid.* at 156.
[82] Patricia Hill Collins, "African-American Women and Economic Justice: A Preliminary Analysis of Wealth, Family, and African-American Social Class" (1997) 65 U. Cin. L. Rev. 825 at 831-832 cited in *International Intersectionality, ibid.* at 156.

grounds of discrimination. For the benefit of the applicant(s) in a given case, the Court could analyse, first, whether compounded discrimination (that includes all such legally cognizable identity traits) is made out and, where it is not, analyse each ground separately, or partner grounds of discrimination up according to the evidence presented by the applicants. When making a "due diligence" claim that falls under Article 7(b) of the Belém Convention, the identity traits that are included in the analysis should be any and all traits relevant to the context-driven nature of the due diligence test. This argument will be developed further, below.

Pursuant to this approach, identity traits inextricable from an individual's identity or perceived identity are only considered apart from one another in exceptional cases. The first example of such a case would be where one or more of the identity traits were found not legally actionable for the purpose of the discrimination analysis (pursuant to Article 1(1) of the Convention). However, as mentioned, such an identity trait or contextual factor could still be considered relevant to a claim made pursuant to Article 7(b), which requires State Parties to "apply due diligence to prevent, investigate and impose penalties for violence against women"[83]. The second such exceptional case would be where the identity trait was actionable pursuant to Article 1(1), but found to be irrelevant in the course of the compounded discrimination analysis. Centring the claimant requires the Court to initiate its analysis with the complexity of the "whole"[84] individual before it. For discrimination claims, this approach favours complexity over simplicity and, by so doing, it approaches the issues of discrimination on its own terms, according to the truly complex nature of discrimination, itself.

Centring the subject in the analysis is the essential first step for an anti-essentialist approach to such claims because it improves accuracy with regards to the subjectivity of the wronged and, thereby, the recognition of the wrong and in a given case. As will be discussed in greater detail below regarding compounded stereotypes and multiple systems of oppression, without understanding the subject and her or his context, it is impossible to

[83] *Belém Convention, supra* note 18 at Art. 7(b).
[84] Or as whole as the individual can be within the confines of anti-discrimination law.

progress to the next step of fully and accurately naming the wrong (e.g. stereotypes, oppressive power relations) and identifying the human rights violation (e.g. discrimination, violence against women).

Indeed, it is clear that "[t]he ability to eliminate a wrong is contingent on it first being "named," by which is meant that a particular experience has been identified and publicly acknowledged as a wrong in need of legal and other forms of redress and subsequent prevention."[85] As one scholar pointed out with regards to the significance of naming a wrong:

> Unless something is named as an injury, it cannot lead to a dispute. Unless the injured person knows that her experience is recognized as an injury, she cannot proceed with 'blaming' and 'claiming.' The first stage in the process, naming, requires information, which is essential to mobilize the process of demanding rectification and amelioration.[86]

As we shall see when we apply this approach to the Court's analysis in *Gonzalez v. Mexico*, centring the subject in the analysis may also have important impacts on legal analysis, itself. This is because, in its bid for accuracy with regards to identifying the wrong and the wronged, centring the subject can also serve to unmask facts rendered invisible by erroneously essentialistic approaches to identity for the Court's further consideration. Further, this approach can assist the Court in making out how the State Party acted in violation of Article 1(1) of the Convention in compounded discrimination cases without it having to resort to an arbitrary and false choice between single grounds of discrimination. As we shall also see, centring the subject in the analysis will ultimately assist the Court with the crating of adequate reparations in cases involving compounded discrimination and violence against women.

Second, it is important to be aware that, in compound discrimination cases, identity-based stereotyping, where it exists, is of a very different nature, and that, therefore, an additive approach cannot be taken to the question of what I will refer to here as "compounded

---

[85] *Gender Stereotyping, supra* note 77 at 39.
[86] Ruth Halperin-Kaddari, *Women in Isreal: A State of Their Own* (Philadelphia: University of Pennsylvania Press, 2004) at 7 cited in *Gender Stereotyping, ibid*.

stereotypes". As Cook and Cusack explain, "Compounded stereotypes often reflect false preconceptions about different subcategories of women, and evolve according to different articulations of patriarchy and power structures."[87] However, before discussing the determination of compounded stereotypes, it is important to, first, set out how stereotypes harm and discriminate against people. According to Rebecca J. Cook and Simone Cusack, stereotypes about women degrade them and diminish their dignity.[88] They can be utilized to "deny them justified benefits or [to] impos[e] unjust burdens."[89] Sophia Moreau explains that stereotypes amount to the wrong of unequal treatment if the subject was "denied a benefit in a manner that lessens their autonomy, that may have been arbitrary, [and/or] that may have involved the unacceptable assumption that they lack intrinsic worth."[90] The Inter-American Court, itself, explained in *Gonzalez v. Mexico* how it identifies the connection between stereotypes and actionable discrimination and the violation of a woman's right to live free of violence:

> [W]hen investigating this violence, some authorities mentioned that the victims were "flighty" or that "they had run away with their boyfriends," which, added to the State's inaction at the start of the investigation, *allows the Tribunal to conclude that, as a result of its consequences as regards the impunity in the case, this indifference reproduces the violence that it claims to be trying to counter, without prejudice to the fact that it alone constitutes discrimination regarding access to justice. The impunity of the crimes committed sends the message that violence against women is tolerated; this leads to their perpetuation, together with social acceptance of the phenomenon, the feeling women have that they are not safe, and their persistent mistrust in the system of administration of justice.*[91]

The Court here pointed out two ways in which stereotypes can be at the root of discrimination and violence against women; first, it identified stereotypical attitudes as constituting, in and of themselves, discrimination; and second, it identified how stereotyping can be used to perpetuate discriminatory attitudes and behaviour throughout a given society, perpetuating violence and depriving women of rights such as access to

---

[87] *Gender Stereotyping, supra* note 77 at 30.
[88] *Gender Stereotyping, ibid.* at 3.
[89] *Gender Stereotyping, ibid.* at 3.
[90] Sophia R. Moreau, "The Wrongs of Unequal Treatment" (2004) 54 University of Toronto Law Journal 291 [hereinafter *Unequal Treatment*] at 303.
[91] *Gonzalez, supra* note 2 at 400 [emphasis added].

justice. The Court went on to underscore the words of the Inter-American Commission with regard to how stereotypical attitudes are specifically associated with discrimination in the context of violence against women:

> The influence exerted by discriminatory socio-cultural patterns may cause a victim's credibility to be questioned in cases involving violence, or lead to a tacit assumption that she is somehow to blame for what happened, whether because of her manner of dress, her occupation, her sexual conduct, relationship or kinship to the assailant and so on. The result is that prosecutors, police and judges fail to take action on complaints of violence. These biased discriminatory patterns can also exert a negative influence on the investigation of such cases and the subsequent weighing of the evidence, where stereotypes about how women should conduct themselves in interpersonal relations can become a factor.[92]

As Sophia R. Moreau points out, and as the Court and Commission seem to accept implicitly here, stereotypical treatment amounts to a wrong which is "not given by any comparative fact"[93] As Moreau puts it:

> the reason [the denial of a benefit on the basis of a stereotype] amounts to a wrong…is not given to any comparative fact – that is, any fact that depends on a comparison between the situation of these individuals and that of the groups who have received the benefit. Rather, it depends only on the fact that, considered in and of themselves, these individuals have been treated in an unacceptable way by the government: they have been denied a benefit in a manner that lessens their autonomy, that may have been arbitrary, that may have involved the unacceptable assumption that they lack worth…In order to ascertain whether their treatment by the government had these features, we do not need to compare the situation of these individuals with that of others.[94]

This fact means that discrimination based on stereotyping can and should be treated as non-comparative in nature. I highlight this point because it undermines any argument in favour of essentializing women's experience so as to compare their discrimination, on the basis of sex, with men. *Anyone* who has been treated in this unacceptable way has been subject to unacceptable and actionable discrimination.

---

[92] Inter-American Commission on Human Rights, *Access to justice for women victims of violence in the Americas,* OEA/Ser.L/V/II. Doc. 68, January 20, 2007 cited in *Gonzalez, supra* note 2 at 400.
[93] *Unequal Treatment, supra* note 90 at 303.
[94] *Unequal Treatment, ibid.*

The next point, then, is that, if stereotyping is one of the root causes of discrimination and violence against women, it is essential that stereotypes be accurately named and identified, in order that they may be eradicated (and, thus, the human rights violation remedied). As alluded to, above,

> The ability to eliminate a wrong is contingent on it first being "named," by which is meant that a particular experience has been identified and publicly acknowledged as a wrong in need of legal and other forms of redress and subsequent prevention. Naming is an important tool for revealing an otherwise hidden harm, explaining its implications, and labeling it as a human rights concern, grievance, or possible human rights violation. Once a wrong has been named, it is then possible to identify whether it is a form of discrimination and set about the task of securing its elimination through the adoption of legal and other measures.[95]

With compounded stereotyping, this naming process can be more complex than stereotyping found to be based on a single factor (ie. gender stereotyping). Cook and Cusack explain that compounded stereotypes arise when "(g)ender intersects with other traits in a wide variety of ways to create compounded stereotypes that impede the elimination of all forms of discrimination against women and the realization of substantive equality."[96] It is inaccurate to speak of such stereotyping as "double" or "triple" stereotyping. Instead, the discrimination victims face is multiplied and reflected in a different output altogether.

An example of this kind of compounded stereotyping was set out recently by the Special Rapporteur - Women in the Colombia Report, in which she found that Afro-Colombian women in Colombia are "subject to cultural stereotypes based on their sexuality"[97] and that they have been stigmatized due to the belief that "black women are dirty, thieves, or if they come to work in a house they are only useful in bed."[98] This is a stereotype about Afro-Colombian women that is clearly not the result of adding up stereotypes about Afro-Colombian people and stereotypes about women, generally, but is, instead, an entirely different output associated uniquely with the Afro-Colombian subgroup of women in

---

[95] *Gender Stereotyping, supra* note 77 at 39.
[96] *Gender Stereotyping, ibid.* at 29.
[97] *Colombia Report, supra* note 13 at 42.
[98] *Colombia Report, ibid.* at 45.

Colombia. An approach that included an analysis of the operative compounded stereotypes allowed the Special Rapporteur - Women to name the compounded stereotype here, and proceed to analyse how it harmed and discriminated against the specific subgroup of Afro-Colombian women in the context of the armed conflict in Colombia.[99]

Finally, it will be necessary for the Court to engage in an analysis of what I will refer to as "multiple systems of oppression." As the Belém Convention states at its Preamble:

> …violence against women is an offense against human dignity and a manifestation of the historically unequal power relations between women and men…[100]

Thus, when dealing with victims of discrimination and violence against women it is important to identify, where relevant, and from the beginning, the history of oppression a person belonging to these groups has faced, including a "history of … exclusion, invisibility and social disadvantage, both economic and geographic"[101] based on the identity characteristics deemed relevant in the given case. Where there is more than one identity trait that feeds this oppression, I refer to this as "multiple systems of oppression". The analysis related to multiple systems of oppression is similar to the compounded stereotype analysis in that it requires applying an anti-essentialist analysis to a root cause of discrimination – oppression – in order to better understand and describe that harm and how it discriminated against women in a given case. Again, before discussing the "multiple systems of oppression" analysis, it is important to set out how the existence and perpetuation of oppressive power relations harms and discriminates against people.

According to Moreau, unequal treatment wrongs individuals when it perpetuates oppressive power relations.[102] Yet, while unequal treatment can cause "power imbalances that are unacceptably large and that leave certain individuals without sufficient social or political influence"[103], they are also self-reinforcing in that the resulting lack of "sufficient social or political influence" is frequently at the heart of further oppression and discriminatory

---

[99] *Colombia Report, supra* note 13.
[100] *Belém Convention, supra* note 18 at Preamble.
[101] *Colombia Report, supra* note 13 at 40.
[102] *Unequal Treatment, supra* note 90 at 303.
[103] *Unequal Treatment, ibid.* at 304.

treatment. In other words, oppressive power relations are both the cause and consequence (manifestation) of unequal treatment. Moreau points out that the perpetuation of oppression harms the victim's autonomy and/or deprives them of certain "goods" such as "the opportunity to participate as equals in public political argument, the opportunity to have equal influence in certain social contexts, and the opportunity to contribute to a genuinely collective self-determination."[104] Cook and Cusack provide an example of how political and economic subordination can become perpetuated in their discussion of laws in Chihuahua State, Mexico that ensure that husbands are financially responsible for their families and marital property. As Cook and Cusack describe, these provisions ensure a "situation of de jure dependency for women, foster women's inferiority and economic subordination, and promote unequal power relations between men and women."[105] This is a clear example of how a source of economic subordination can both discriminate against the subject in the first instance and, in turn, perpetuate further discriminatory oppressive power relations.

I would add one further "good" to Moreau's list, deprived to various individuals due to oppressive power relations; that is the opportunity to live relatively unexposed to certain kinds or extremes of violence. This "good" is, of course, particularly pertinent to the issue of violence against women, and will be discussed in greater detail below.

First, it is relevant to point out, as Moreau does, that, unlike the issue of respect for dignity, for example, which is central to the issue of compounded stereotyping, the goods (or, as I shall also refer to them, the "costs") listed above are all relational in that they "concern the individual's standing and opportunities in relation to those of others, and they can be assessed only through a comparison of the individual to others."[106] Moreau notes:

> [O]ne must engage in comparative judgements to ascertain whether differential treatment in fact perpetuates oppressive power relations. And when it does, this

[104] *Unequal Treatment, supra* note 90 at 305.
[105] *Gender Stereotyping, supra* note 77 at 168.
[106] *Unequal Treatment, supra* note 90 at 306.

> amounts to a wrong largely because it denies the individual access to certain relational goods.[107]

She goes on to note, however, that:

> the relevant comparator groups is not the group that has been given the benefit in question but the group or groups who exercise oppressive amounts of power over those who have been denied the benefit. That is because, in order to ascertain whether the denial of a benefit genuinely perpetuates oppressive power relations, one needs to focus not on the group that has been given the benefit but, rather, on whether or not there is indeed some group that exercises an undue amount of power over those who are denied the benefit and on whether the denial of the benefit will perpetuate these unacceptable power relations.[108]

While she notes that, in some cases, the group that receives the benefit and the group that exercises undue domination over the oppressed group are coextensive, she indicates that "what is relevant about the comparator group is not their receipt of the benefit but their oppression of those who have been denied it."[109]

Once again, this means that the tendency to essentialize women's experiences in order to compare them with those of men is unnecessary and even unhelpful.

As with compounded stereotypes an additive model should be rejected as an approach to analysing multiple systems of oppression in compounded discrimination cases as based on the false premises that "gender and, for example, racial oppression can be separated"[110] and, instead, it is necessary to recognize that "multiple systems of oppression are mutually reinforcing and produce an entirely different breed of discrimination."[111] As one scholar puts it:

> To look at white, middle-class women as subordinated *as women* is accurate as far as it goes, but their experience of oppression is not interchangeable with the oppression of non-white, non-middle-class women. The whiteness and middle-class status supply privilege even as the femaleness conveys oppression.[112]

---

[107] *Unequal Treatment, ibid.*
[108] *Unequal Treatment, supra* note 90 at 306.
[109] *Unequal Treatment, ibid.*
[110] *International Intersectionality, supra* note 1 at 97, footnote 102.
[111] *International Intersectionality*, *ibid.*
[112] *Anti-essentialism and Intersectionality, supra* note 49 at 19.

In cases of multiple systems of oppression for victims of violence, the particularly pertinent "cost" to the victim can be seen as an increased vulnerability to violence or to different forms of violence. Kimberle Crenshaw, upon observing the lived experiences of women of color in minority communities in Los Angeles, noted that violence against women of color is "merely the most immediate manifestation of the subordination they experience."[113] Many of these women, she notes, are also unemployed/underemployed and of lower socio-economic status. She noted that they are burdened with poverty, child care responsibility, and lack of jobs skills – the result of gender- class- *and* race-oppression.[114]

Unfortunately, the consideration of how multiple forms of oppression expose subjects to increased vulnerability is a process that tends to essentialize the experiences of certain sub-groups of women subjects, and perpetuate existing compounded stereotypes about them, and even expose them to other violations of their human rights. As Cook and Cusack point out, on the question of violence against women in Ciudad Juárez:

> Ciudad Juárez's rapidly changing socioeconomic landscape and the vulnerability of victims have further perpetuated the stereotype that poor, young, migrant women are inferior and subordinate to men.[115]

Such a process may not only lead to the perpetuation of (compounded) stereotypes but may also justify State interventions that actually undermine women's autonomy and human rights.[116] Dianne Otto points out "Nepal's new restrictions on the ability of women to travel overseas [which] were defended as a measure to protect them from trafficking"[117] to illustrate "the ease with which protective narratives can justify the denial of women's enjoyment of human rights".[118]

Thus, it will be essential for the Court to be careful in both its analysis and the remedies it orders, not to create or perpetuate any kind of stereotype, or sanction interventions that undermine women's rights, either of which would only serve to perpetuate oppressive

---

[113] *Mapping, supra* note 50 at 358.
[114] *Mapping, ibid.*
[115] *Gender Stereotyping, supra* note 77 at 169.
[116] *Tragedy*, *supra* note 30 cited in *Lost in Translation, supra* note 25 at 346.
[117] *Lost in Translation, ibid.*
[118] *Lost in Translation, ibid.*

power relations and discrimination. It is important to recall at this juncture that, under the Belém Convention, women have the *right* to live free from violence – violence against women not just symbolizing a 'barrier' to their full enjoyment of rights. Thus, the Court should attempt to develop remedies that have the potential to bring about transformative equality, and that will ensure women the full scope of their rights under the Belém Convention. Recognition of the multiple forms of oppression faced by a particular sub-group of women should, instead, aid the Court with recognition of some of the background (societal structures) that led to and perpetuated the wrong and, further, as will be discussed below, assist the Court in developing remedies to target and eradicate this underlying cause of discrimination and violence against women.

Therefore, for compounded discrimination and violence against women claims, it is necessary for the Court to engage in a complex analysis that involves situating the subject at the centre of the analysis, and to examine, where relevant, the mutually reinforcing systems of oppression and the compounded stereotypes that may have underlain the discrimination in these cases. This kind of analysis will assist the Inter-American Court in its attempt to recognize the particular wrong against a given applicant, and improve its understanding of the invidious nature of the discrimination in question which will, it is hoped, help it to respond with "more appropriate and effective strategies for preventing and remedying these violations."[119]

6 Applying the Anti-Essentialist Framework to *Gonzalez v. Mexico*

6.1 Introduction

As discussed above, the Anti-Essentialist Framework for compounded discrimination claims requires an approach that situates the subject of the discrimination at the centre of the analysis, identification and analysis of if and how compounded stereotypes played a role in the discrimination, and an examination of the multiple forms of oppression experienced by the subjects. The analysis of the latter two of these requirements, while

[119] *International Intersectionality, supra* note 1 at 119.

assisting the Court with the discrimination analysis, will also be of great assistance at the reparations stage. The following discussion will review how the Court's approach to the discrimination and violence against women claim in *Gonzalez v. Mexico* measured up against the Anti-Essentialist Framework, as discussed above, and, further, explain how this Framework might have assisted the Court in its analysis, given the facts before it. The purpose of this discussion is to illustrate how the Framework could assist the Court with the analysis, itself, and with the task of naming and identifying the discrimination in compounded discrimination and violence against women cases.

6.2 Situating the Subjects at the Centre of the Discrimination/Violence against Women Analysis

The Court in *Gonzalez v. Mexico* identified the victims of violence in Ciudad Juárez as "young women, including girls, women workers – especially those working in the *maquilas* – who are underprivileged, students or migrants."[120] Despite this acknowledgement, this subject is largely set aside as the Court narrowed in on the "woman" aspect of their identity as signified by the "sex" category in Article 1(1) of the Convention. This is reflected in the discrimination and violence against women analysis, which analyses only the harm to the claimants *as women*. For example, in assessing the alleged discriminatory attitudes of state officials, the Court adopted the conclusions of the National Commission on Human Rights, [hereinafter "CNDH"] that the failure to investigate many of the crimes against women constituted a form of "sexist denigration."[121] The following discussion will provide some examples of how situating an accurately-described subject at the centre of the analysis could have assisted the Court with the analysis, itself, and with naming and identifying the discrimination and violence against women in this case.

---

[120] *Gonzalez, supra* note 2 at 123.

[121] Comisión Nacional de los Derechos Humanos (México), *Recomendación 44/1998* issued on May 15, 1998 [hereinafter *CNDH Report 1998*] cited in *Gonzalez, ibid.* at 154 it should be noted, however, that the Court came to these conclusions based on the evidence before it in this regard. Advocates can and should also attempt to highlight for the Court how various identity traits are relevant to the discrimination analysis in certain cases.

One example of how centring the subject in the analysis could have assisted with the analysis, itself, arose in the context of the "due diligence to prevent" analysis, pursuant to Article 7(b) of the Belém Convention. Recall that the Court has contentious jurisdiction *rationae materiae* over Article 7 of the Belém Convention, and that Article 7(b) sets out the following obligation on State Parties:

> The States Parties condemn all forms of violence against women and agree to pursue, by all appropriate means and without delay, policies to prevent, punish and eradicate such violence and undertake to:
>
> b. apply due diligence to prevent, investigate and impose penalties for violence against women[122]

The Court articulated its "due diligence to prevent" test in *Gonzalez v. Mexico.* In setting out this test, the Court sought guidance from the jurisprudence of the European Court of Human Rights [hereinafter the "ECHR"][123], clarifying that,

> the obligation to prevent has – in general and with the exception of special situations in which the State occupies a special position of guarantor – three components that must all be present: (1) the "awareness of a situation of real and imminent danger"; (2) "a specific individual or group of individuals," and (3) "reasonable possibilities of preventing or avoiding that danger."[124]

The Court cited *Kiliç v. Turkey* [hereinafter *Kiliç*] in support of this test, and for the proposition that the "specific circumstances of the case and the discharge of such obligation to guarantee must be taken into account."[125] Indeed, the test is primarily a context-driven one. In *Kiliç*, the applicant, Mr. Kiliç, was a pro-Kurdish journalist who claimed a violation of the obligation to protect the right to life after receiving and reporting death threats to government officials.[126] The State Party was found responsible for failing to prevent Mr. Kiliç's death in this case.[127] However, because this case centred around an individual whom the government was specifically aware was being threatened, *Kiliç* did little to

---

[122] *Belém Convention*, *supra* note 18 at Art. 7(b).
[123] See *Kiliç v. Turkey*, App. No. 22492/93, Eur. Ct. H.R. 128 (2000) at 63.
[124] *Gonzalez et al. ("Cotton Field") v. Mexico* (Concurring Opinion of Judge Diego García Sayán) (2009) Inter-American Court of Human Rights. [hereinafter *Concurring Opinion – Gonzalez*] at 9.
[125] *Gonzalez, supra* note 2 at 280.
[126] *Remedies for Women of Juárez, supra* note 72 at 501.
[127] *Remedies for Women of Juárez, ibid*.

broaden the duty of due diligence to protect. However, in *Kaya v. Turkey*[128], a case decided by the ECHR later the same year in which *Kiliç* was decided, "the Court went one step further and ruled that the government had some responsibility for the death of a doctor who had given aid to wounded members of the PKK (Worker's Party of Kurdistan) even though they were not aware of specific threats to this particular doctor."[129] In that context, it was generally known that sympathizers of the PKK were being targeted and, further, a government report had charted the pattern of killings and set out recommendations for their prevention.[130] The precedent set in this case was that "[w]hen there is a general pattern that is known to the authorities, the state has a duty to take reasonable operational steps to prevent abuses."[131]

With regards to the analysis in *Gonzalez v. Mexico*, the Court started with the subject well-centred, indicating that "the State should adopt preventive measures in specific cases in which it is evident that certain women and girls may be victims of violence."[132] The Court went on to explain that the obligation to prevent arose at two specific moments: prior to the disappearance of the victims, and prior to the discovery of their bodies.[133] The Court found the State responsible for a violation of the obligation of due diligence to protect prior to the discovery of the bodies.[134] However, regarding the moment prior to the disappearance of the victims, the Court concluded that: "even though the State was aware of the situation of risk for women in Ciudad Juárez, it has not been established that it knew of a real and imminent danger for the victims in this case."[135] Regarding the identities of the claimants throughout their analysis, the Court only acknowledged that "international obligations impose…a greater responsibility with regard to the protection of women in Ciudad Juárez, who are in a vulnerable situation, particularly young women from humble backgrounds."[136]

---

[128] *Kaya v. Turkey*, App. No. 22535/93, Eur. Ct. H.R. 129 (2000).
[129] *Remedies for Women of Juárez, supra* note 72 at 501.
[130] *Remedies for Women of Juárez, ibid.*
[131] *Remedies for Women of Juárez, ibid.* at 502.
[132] *Gonzalez, supra* note 2 at 258.
[133] *Gonzalez, ibid.* at 281.
[134] *Gonzalez, ibid.* at 284.
[135] *Gonzalez, ibid.* at 282.
[136] *Gonzalez, ibid.*

Unfortunately, this misses the point that the identity of the victims did not just elevate the State's obligations towards them pursuant to Article 7(b) of the Belem Convention – though they did - they were relevant context-building factors in the "due diligence to protect" analysis, itself.

Prior to demonstrating how centring the subjects in the analysis could have assisted with the analysis, itself, it is interesting and relevant to point out here that, as this discussion regards the due diligence test (pursuant to Article 7 (b) of the Belém Convention), and not a discrimination test, the Court is not bound to any categories of identity against which the wrong a claimant endured must be assessed. Instead, it will be argued that any and all relevant identity factors should be acknowledged and centred in the analysis.

Had the Court in *Gonzalez v. Mexico* approached the due diligence to prevent test with the subjects already centred in the analysis (again, with all *relevant* identity traits acknowledged), the first component of the test would have been to determine whether there had been a situation of real and imminent danger for young, socio-economically disadvantaged, in some cases migrant, student or maquila worker women and girls in Ciudad Juárez prior to the disappearances of the victims. In this regard, the Court could have taken note of the fact that, prior to the disappearances of Gonzalez, Herrera Monreal and Ramos Monárrez, hundreds of women of similar descriptions had already become frequent victims of abduction and murder over at least an 8 year period in Ciudad Juárez, Mexico. In this regard, it is not just notable to relate the Special Rapporteur on the Rights of Women's findings that:

> (i) murders of women increased significantly in 1993;
> (ii) the coefficients for murders of women doubled compared to those for men; and
> (iii) the homicide rate for women in Ciudad Juárez is disproportionately higher than that for other border cities with similar characteristics"[137],

but also that reports of various well-respected organizations such as Amnesty International, CEDAW and of the Inter-American Commission, itself, indicated that, in fact, a specific

[137] *Commission Report – Juárez, supra* note 10 cited in *Gonzalez, supra* note 2 at 117.

subgroup of women were being targeted. Indeed, in its 2002 report on the situation of the women of Ciudad Juárez, the Commission reported that:

> (b)oth the State and non-state sectors reported a significant number of killings characterized as multiple or "serial" in nature -- fitting a pattern with respect to the circumstances. The victims of these crimes have preponderantly been young women, between 15 and 25 years of age. Some were students, and many were *maquila* workers or employed in local shops or businesses. A number were relative newcomers to Ciudad Juárez who had migrated from other areas of Mexico.[138]

While recognition of identity and context can aid the Court in identifying the nature of the risk to the claimant, it can also assist the Court in identifying the breadth of the target group. In other words, the very identity characteristics that helped demonstrate multiple risk can also assist the Court in narrowing in on the specific target group for the second component of the test: a specific individual or group of individuals.

Finally, centring the subject in the analysis would have also aided the Court in its final query: were there reasonable possibilities of preventing or avoiding the danger faced by this/these subgroup(s) of women? For example, the Court could have queried whether, given that the State was made aware since at least 1998 of a pattern of violence against women[139], were there reasonable possibilities of preventing the danger they faced? In order to answer this question, the Court would first have to ask: should the State Party have reasonably been expected to develop special measures to provide greater security, safer transportation to the *maquilas* and schools and other preventative measures directed at this *specific* subgroup of women?

The Court in *Gonzalez v. Mexico* ultimately concluded that "even though the State was aware of the situation of risk for women in Ciudad Juárez, it has not been established that it knew of a real and imminent danger for the victims in this case."[140] Whether centring the claimants in the "State obligation to prevent" analysis will lead to a finding of State responsibility will, of course, depend upon the circumstances of each case. Given the

---

[138] *Commission Report – Juárez, supra* note 10 at 44.
[139] *CNDH Report 1998, supra* note 121 cited in *Gonzalez, supra* note 2 at 282.
[140] *Gonzalez, ibid.*

context-driven nature of this test, what is important here is that the Court asks the correct question through engagement with the relevant facts. As pointed out by Judge Diego García-Sayán in his concurring opinion in *Gonzalez v. Mexico*, the Court should be concerned about "weakening and blurring fundamental concepts such as "violation of human rights" or "international responsibility of the States," and avoid such concepts being confused with facts that are, evidently, very serious but juridically different and distinguishable, such as the criminal activity of individuals."[141] As Judge García-Sayán further indicated in his concurring opinion, "the obligation to prevent cannot be interpreted in a way that imposes an impossible or disproportionate burden on the State."[142] Centring the subject in compounded discrimination and violence against women cases will serve to assist the Court with the analysis, itself, by providing the Court with relevant contextual information at each stage of the test, which will ultimately allow the Court to bring greater clarity and guidance to this area of human rights law.

This example is intended to be illustrative, rather than exhaustive, regarding the question of how centring the claimant in the analysis in discrimination and violence against women claims can assist the Court with the analysis, itself. One of the important things centring the claimant does is it allows certain central facts back into the picture that were previously banished due to an erroneously essentialistic approach to identity. Certain identity factors may be more or less relevant for different legal analyses in different cases. Since centring the claimant in the analysis in compound discrimination and violence against women cases serves the important purpose of improving the accuracy of a context-driven test, it should always be done. In many cases it will be in hindsight that we can identify the assistance that doing so provided the Court.

Centring the claimant in the analysis is also key for the discrimination analysis. In *Gonzalez v. Mexico*, the Court found no violations of the right to be free from discrimination based on "national or social origin, economic status, birth, or any other social condition", all of which were legally cognizable bases for discrimination, and highly relevant to the contexts

[141] *Concurring Opinion – Gonzalez, supra* note 124 at 14.
[142] *Concurring Opinion – Gonzalez, ibid.* at 6.

of the various applicants in the case. Thus, no analysis was pursued regarding the State's responsibility for discrimination on those various grounds. Since identity is so central to discrimination claims, centring the claimant in the discrimination analysis would have brought these various grounds to the surface for further analysis. Furthermore, centring the claimant in the discrimination analysis is the condition precedent for assessing the other two aspects of the framework: the examination of compounded stereotypes and multiple forms of oppression experienced by the subjects, both of which underpin discriminatory societal structures, and whose recognition is critical for the purpose of developing adequate remedies for their eradication.

6.3 Identifying the Compounded Stereotype and its Discriminatory Effect

In *Gonzalez v. Mexico* the Inter-American Court identified comments made by state officials in Ciudad Juárez as constituting stereotyping[143] which, they declared to be "one of the causes and consequences of gender-based violence against women"[144] which, in turn, to "constitute[] a form of discrimination."[145] The Court pointed out that:

> Bearing in mind the statements made by the State ... the subordination of women can be associated with practices based on persistent socially-dominant gender stereotypes, a situation that is exacerbated when the stereotypes are reflected, implicitly or explicitly, in policies and practices and, particularly, in the reasoning and language of the judicial police authorities, as in this case. The creation and use of stereotypes becomes one of the causes and consequences of gender-based violence against women.[146]

Based on this assessment, the Court went on to find the State in violation of its obligation not to discriminate pursuant to Article 1(1) of the Convention, in relation to its obligation to guarantee the rights set out in Articles 4(1), 5(1) and (2) and 7(1).[147]

However, while highlighting and focussing on gender stereotyping in this case as a form of discrimination, the Court's analysis failed to described or engage with the various identities

---

[143] *Gonzalez, supra* note 2 at 208.
[144] *Gonzalez, ibid.* at 401.
[145] *Gonzalez, ibid.* at 402.
[146] *Gonzalez, ibid.* at 401.
[147] *Gonzalez, ibid.* at 402.

of the victims that intersected to compound the stereotypes against them. As Cook and Cusack explain:

> [In the context of Ciudad Juárez] it is not just attributes, characteristics or roles associated with a woman's sex or gender that make a poor, young, migrant woman inferior (a gender stereotype); it is also the attributes, characteristics and roles associated with her age, race, socioeconomic status, type of employment and, for example, her status as a migrant (a compounded stereotype). Usage of this stereotype implies that state authorities do not have to treat the subgroups of poor, young, migrant women as having intrinsic and equal worth; this subgroup is subordinate and inferior to men and other subgroups of women.[148]

Indeed, a close look at the comments made by the officers responsible for investigating these cases reveals that compounded stereotypes were operative in this case. Amongst other comments, officers were reported as stating as follows:

> To the mother of Esmeralda Herrera: that her daughter "had not disappeared, but was out with her boyfriend or wandering around with friends"[149] and that "that, if anything happened to her, it was because she was looking for it, because a good girl, a good woman, stays at home."[150]
>
> To the mother of Claudette Ivette: that "she is surely with her boyfriend, because girls were very flighty and threw themselves at men."[151]

I will posit that these statements reflect stereotypes about the subjects that they are promiscuous, flighty or irresponsible, bad girls and, consequently, responsible for their plight, of little value, and expendable. Further, they reflect a commentary on certain subgroups of women who, at their core, deviate, or are assumed to deviate, from what a "good girl" should be – from the normative ideal of womanhood. The claimants in this case were women and, in combination with that fact, they were young - a status which saw them stereotyped as flighty and irresponsible and, therefore, to blame for their plight – and socioeconomically disadvantaged (and migrants in some cases) – a status which saw them stereotyped as being of little value and expendable.

---

[148] *Gender Stereotyping, supra* note 77 at 168.
[149] *Gonzalez, supra* note 2 at 198.
[150] *Gonzalez, ibid.*
[151] *Gonzalez, ibid.* at 199.

Furthermore, these comments demonstrate how the authorities "minimized the problem" and showed a "lack of interest and willingness to take steps to resolve a serious social problem"[152], facts which were highlighted for the Court by the testimony of the victims' mothers and national and international organizations.[153] I would suggest, as the UN Human Rights Council did, that this lack of action and tendency to minimize the problem further reflects the fact that these women, as young, socioeconomically disadvantaged, and migrants, were subject to a compounded stereotype that they were of little value and expendable. As the U.N Human Rights Council put it:

> The arrogant behaviour and obvious indifference shown by some state officials in regard to these cases leave the impression that many of the crimes were deliberately never investigated for the sole reason that the victims were 'only' young girls with no particular social status and who therefore were regarded as expendable.[154]

Thus, with an analysis that, first, centres the subject, the Court is poised to recognize compounded stereotypes where they may exist. After naming the compounded stereotypes involved, the Court can analyse how such attitudes harmed and discriminated against the subgroup of women in question. This discrimination analysis is not a comparative one; it does not require the assessment of "women's experiences" vis-à-vis those of men. Instead, the discrimination associated with compounded stereotyping has to do solely with the fact that "these individuals have been treated in an unacceptable way by the government: they have been denied a benefit in a manner that lessens their autonomy, that may have been arbitrary, that may have involved the unacceptable assumption that they lack worth."[155]

The question, then, is: how did the compounded stereotypes that these women were flighty, irresponsible and, therefore responsible for their own plight and, ultimately, expendable, harm and discriminate against them? The answer is that they served to diminish to the point of expendability the worth of these women in the eyes of the officers with carriage of their

---

[152] *Gonzalez, supra* note 2 at 203.
[153] *Gonzalez, ibid.*
[154] Human Rights Council, *Civil and Political Rights, Including Questions of: Disappearances and Summary Executions; Visit to Mexico*, UN Doc. E.CN.4/2002/3/Add.3 (1999) (prepared by Special Rapporteur on extrajudicial, summary or arbitrary executions, Ms. Asma Jahangir) at para. 89.
[155] *Unequal Treatment, supra* note 90 at 303.

cases. The impunity with which the guilty got away with these crimes sent the message that extreme sexual violence and even murder of this subgroup of women would be tolerated. This served to perpetuate violence against this subgroup of women, and bolster social acceptance of the phenomenon, and the feeling young, socioeconomically disadvantaged, migrant, students or *maquila* worker women had that they were not safe, feeding their (well-placed) mistrust in the justice system.

If any of that sounds familiar; it should. Much of the wording is borrowed from a quote taken from the Court *Gonzalez v. Mexico*, which was cited above, in which the Court found that stereotyping harmed women in this case. Recall that the Court found on the issue of stereotyping that the officers' comments:

> …added to the State's inaction at the start of the investigation, allows the Tribunal to conclude that, as a result of its consequences as regards the impunity in the case, this indifference reproduces the violence that it claims to be trying to counter, without prejudice to the fact that it alone constitutes discrimination regarding access to justice. The impunity of the crimes committed sends the message that violence against women is tolerated; this leads to their perpetuation, together with social acceptance of the phenomenon, the feeling women have that they are not safe, and their persistent mistrust in the system of administration of justice.[156]

As we can see from the original quote, the Court only analysed the stereotype through the single lens of gender stereotyping, thereby missing the extreme situation of vulnerability the particular subgroup of women was placed in vis-à-vis the system of justice and the context of violence due to a compounded stereotype that, ultimately, targeted them as expendable.

Cook and Cusack explain that:

> Perpetuation of the compounded stereotype of young, poor, migrant women as inferior has resulted in discrimination and violence against them. It has meant that crimes against this particular subgroup have not elicited a significant response from state authorites, which, in turn, has fed the spiral of violence and impunity in Ciudad Juárez.[157]

---

[156] *Gonzalez, supra* note 2 at 400.
[157] *Gender Stereotyping, supra* note 77 at 169.

Since reparations will be built around the eradication of *named* stereotypes, this process of identifying the particular compounded stereotype in compounded discrimination and violence against women claims can help improve the adequacy and appropriateness of the reparations ordered. This latter issue will be dealt with in some detail below.

6.4 Examination of the Multiple Systems of Oppression Experienced by the Subjects

The issue of multiple systems of oppression is also missed by the Inter-American Court in *Gonzalez v. Mexico*. Instead, the Court's allusions to the issue of power relations are limited to the issue of gendered power relations, including its reference to the Belém Convention, that indicates that violence against women is "a manifestation of the historically unequal power relations between women and men"[158], its discussion of gender stereotypes, concluding that "subordination of women can be associated with practices based on persistent socially-dominant gender stereotypes"[159], and in noting evidence submitted by the State Party and the Special Rapporteur - Women and the applicant's representatives indicating the existence of a situation of subordination of women in Mexico.[160] Though it is noteworthy that the Court considered the existence of gendered power relations in this case, a more accurate and complete analysis of cases of compounded discrimination, such as that of *Gonzalez v. Mexico*, would analyse how multiple systems of oppression served to harm and discriminate against the *particular* women victims of violence in these cases.

Starting with the subject centred in the analysis, the first step for the Court would have been to assess whether multiple systems of oppression affected the women victims of Ciudad Juárez. Johanna E. Bond proposed one way in which multiple systems of oppression exist and are perpetuated for women working near the U.S.-Mexico border thus:

> Women working in maquiladoras along the U.S.-Mexican border … often experience discrimination based on their gender and race or ethnicity.

---

[158] *Belém Convention, supra* note 18 at Preamble cited in *Gonzalez, supra* note 2 at 394.
[159] *Gonzalez, supra* note 2 at 401.
[160] *Gonzalez, ibid.* at 132 -133, 138.

> Race/ethnicity-based and gender oppression together force poor Latin women into difficult, low-paying factory work. Multinational corporations, many of which are U.S.-based corporations along the border often require women to submit to invasive, humiliating pregnancy tests in order to secure or retain employment. Power and privilege, represented by the multinationals and exercised at the expense of women workers, contribute to a system of labor exchange characterized by racism and sexism.[161]

Thus, as she points out, women *maquila* workers in Mexico, such as two of the claimants in *Gonzalez v. Mexico*, have been subject to mutually reinforcing systems of oppression based on, at minimum, their gender, ethnicity/race and, it is possible to add, socioeconomic status, that have forced them into low-paying, difficult work that further perpetuates their oppression. I would point out that there are various other ways in which multiple systems of oppression manifested themselves in this case, however, my purpose here is to be illustrative, rather than exhaustive.

The second inquiry would have been to ask: what were the "costs" associated with the multiple systems of oppression in this case? Bond's example highlights well the economic costs of oppression and, in particular, the perpetuation of economic subordination in this case. Multinational corporations, possessors of power and privilege, create the rules that these women must respect as the price for retaining their positions at the factory, and, thus, in many cases, for their very survival. Though perhaps outside of the reach of the Court's jurisdiction, these contextual factors are relevant in the sense that there are actions the State Party could take to mitigate against or prevent the consequences of these multiple systems of oppression that form part of the context for the discrimination in this case. In this way, the Court could conceivably craft reparations targeted at transforming some of the oppressive power relations, as highlighted here.

The second, and perhaps more pertinent "cost" associated with multiple systems of oppression in this case is that this context of oppression serves to expose women to particular forms of violence and/or increased vulnerability to violence. As demonstrated, in part, by Bond, above, these women were multiply burdened by forces that degraded them, not just as women, and relative to men, but also because of their economic, migrant,

[161] *International Intersectionality, supra* note 1 at 126.

race/ethnicity and age statuses vis-à-vis privileged groups in these categories. While feeding into their further oppression, these multiple systems of oppression simultaneously fed into compounded stereotypes about their value or worth as human beings. The combination of these factors perpetuated a system of oppression, the culmination of which was the perpetuation of violence against this subgroup of women. Further, once they would go missing, state authorities took a direct role in denying the victims' loved ones access to justice. As a result, the crimes against these women were maintained in a state of impunity. Thus, the "costs" associated with the multiple systems of oppression faced by the women victims of Ciudad Juárez were: specific/increased vulnerability to violence, and a lack of access to justice.

Once the multiple systems of oppression and the "costs" associated with that oppression have been named, the question the Court would next wish to consider would be: is there "some group that exercises an undue amount of power over those who are denied the benefit and [will] the denial of the benefit … perpetuate these unacceptable power relations"?[162] First, it is apparent in this case that the police and other officials with carriage of the victims' cases exercised an undue amount of power over the victims and their loved ones, which burdened them with the "cost" of a lack of access to justice. Second, this "cost" led to impunity for these crimes and, thus, the further exposure of this subgroup of women to violence. Indeed, with the caveat that the Court did not acknowledge the multiple systems of oppression in this case, it is worth repeating what the Court, itself, concluded in with regard to how oppressive power relations were perpetuated in this case:

> The impunity of the crimes committed sends the message that violence against women is tolerated; this leads to their perpetuation, together with social acceptance of the phenomenon, the feeling women have that they are not safe, and their persistent mistrust in the system of administration of justice.[163]

To contend with the above mentioned caveat, which is, in fact, the subject of this section, it would be of central importance for the Court to identify that access to justice was barred to a specific subgroup of women in Ciudad Juárez, and that the impunity in this case sent a

---

[162] *Unequal Treatment, supra* note 90 at 306.
[163] *Gonzalez, supra* note 2 at 400 [emphasis added].

message that the particular and extreme violence, targeted at a *specific* subgroup of women in Ciudad Juárez, was tolerated. Furthermore, it would be important for the Court to acknowledge that the impunity led to a situation in which violence against this subgroup of women was perpetuated. The relational costs here (specific or increased vulnerability to violence, lack of access to justice, and the perpetuation of multiple systems of oppression) should have been associated with the group to whom they were targeted; that being a subgroup of women who were young, socioeconomically disadvantaged and, in many cases, migrants to Ciudad Juárez vis-à-vis the officers and officials who exercised undue amounts of power and perpetuated the context of oppression and violence against them.

In compounded discrimination cases, reparations should be built around the eradication of multiple systems of oppression and how they perpetuate discrimination against subgroups of women in a given case. Thus, a process that includes identifying both the multiple systems of oppressions and their associated harms can help improve the adequacy and appropriateness of the reparations ordered. This latter issue will be dealt with in the next section.

7. Fashioning Remedies through the Lens of the Anti-Essentialist Framework

7.1 A Critique and Re-fashioning of One Reparation Order from *Gonzalez v. Mexico*

It is not feasible for this paper to consider and analyse all of the relevant reparations ordered by the Inter-American Court in *Gonzalez v. Mexico* through the lens of the Anti-Essentialist Framework. In this section, however, the author will analyse one of the Court's orders for reparations and consider how the Anti-Essentialist Framework might have assisted the Court, beyond the analysis stage, with the crafting of remedies targeted at the eradication of compounded discrimination and violence against specific subgroups of women. Though retrospective, it is hoped that this section will serve to illustrate some of the potential benefits the Framework can offer at the remedies stage for future compounded discrimination and violence against women cases.

The reparation under review here, then, is one of the Guarantee of Non-Repetition orders that is set out as follows:

> Training with a gender perspective for public officials and the general public of the state of Chihuahua
>
> …the Court orders the State to continue implementing permanent education and training programs and courses in: (i) human rights and gender; (ii) a gender perspective for due diligence in conducting preliminary investigations and judicial proceedings in relation to the discrimination, abuse and murder of women based on their gender, and (iii) elimination of stereotypes of women's role in society.
>
> The programs and courses will be addressed to the police, prosecutors, judges, military officials, public servants responsible for providing services and legal assistance to victims of crime, and any local or federal public officials who participate directly or indirectly in prevention, investigation, prosecution, punishment, and reparation…
>
> In addition, taking into account the situation of discrimination against women acknowledged by the State, the State must offer a program of education for the general public of the State of Chihuahua, in order to overcome this situation…[164]

It is apparent that the content of this reparation order represent the culmination of a discrimination and violence against women analysis that focused almost exclusively on *sex* discrimination in Chihuahua State.

Had the Court, however, centred the subjects in the analysis, and considered and analysed the effects of compounded discrimination and multiple systems of oppression, I believe its analysis would have culminated in an order to *both* train officials and educate the public on issues surrounding discrimination and violence against women, generally (given the State Party's acknowledgement of the situation of discrimination against women), *as well as* to create specific modules directly dealing with the issue of compounded discrimination in Chihuahua State and, specifically, compounded stereotypes, and problems related to the perpetuation of multiple systems of oppression that see certain women deprived of economic and political goods, and exposed to increased vulnerability to abuse. These modules would expose how power and oppression can become self-perpetuating phenomena. They would focus specifically on compounded discrimination against young, socioeconomically disadvantaged, migrant women in Chihuahua State, but would also

[164] *Gonzalez, supra* note 2 at 541-543.

serve to raise awareness of the diverse forms of discrimination various subgroups of women face throughout society. They would highlight the *right* of *all* women to live free from discrimination and violence against women pursuant to the American Convention and the Belém Convention. For State officials, in particular, they would teach a compounded discrimination/anti-essentialist approach to identity aimed at improving due diligence in conducting preliminary investigations and judicial proceedings in relation to the discrimination and violence against women in the Chihuahua State.

This remedy would have been better suited to the goal of "redress[ing] the consequences of the infringements"[165], as it is aimed at deterring the *specific* human rights violations in this case. First, since compounded stereotypes were both a root cause and a manifestation of discrimination in this case, as discussed above, the necessary first steps for their eradication would have included accurately naming them and identifying the harm they caused. This analytical process largely parallels the goals of the proposed re-fashioned educational program, that would see this same information disseminated to the greater public and to relevant officials. Indeed, officials and members of the public may be well aware of gender stereotypes, and the harm they cause women (training in this regard already being quite extensive), but unclear as to how stereotypes against young, socioeconomically disadvantaged, migrant women have taken shape in society, and how such compounded stereotypes have targeted and harmed this particular subgroup of women in their society. This education program will explain to officials and members of the public how compounded stereotypes have been used to impose unjust burdens on these women[166], and thereby, it is hoped, terminate the perpetuation of these compounded stereotypes that send the message that women in this subgroup, when subjected to violence, were deserving of the treatment they received. The dissemination of an education program that explicitly recognizes the compounded nature of stereotypes that harm women in Ciudad Juárez would provide officials and members of the public with the knowledge and awareness required to properly challenge and eradicate them in the course of their everyday lives.

---

[165] *Barrios Altos (Chumbipuma Aguirre et al. v. Peru*) (Reparations), Inter-Am. Ct HR, 30 November 2001, Ser. C, No. 87 at 25 cited in *Inter-American Court, supra* note 37 at 239.
[166] *Gender Stereotyping, supra* note 77 at 3.

Second, as we have seen, multiple systems of oppression can burden women with various costs, the most pertinent in this context being additional exposure/vulnerability to abuse and/or exposure to different forms of abuse. This means that "certain norms or practices of domestic law"[167] or other societal structures, may have a discriminatory effects on certain *subgroups* of women by exposing them to increased or even different risks of violence and abuse. Education in multiple forms of oppression can assist officials, and even members of the public, to challenge the laws and practices that may be perpetuating oppression in various ways and along multiple axes. Furthermore, though it cannot presently be proved in this case, there are theories that a conspiracy exists in Ciudad Juárez around targeting the particular subgroup of women discussed for sexual violence and homicide. However, whether or not women of this description were and are exposed to a *different* risk, or simply an *additional* risk, it is necessary to educate officials in how multiple forms of oppression expose these women to the "cost" of this increased exposure to violence that is not generally associated with women who are not part of this subgroup. This knowledge may then serve to introduce officers and investigators to new lines of inquiry when launching both general and individual investigations into the missing and murdered women of Ciudad Juárez.

8. Conclusion

All women have the right to live free from discrimination and violence against them under the American Convention and the Belém Convention. This fact makes it incumbent upon the Inter-American Court to ensure that it has included, within the ambit of its discrimination and violence against women analysis, the capacity to name and identify this harm as it affects *all* women. As has been explored here, the eradication of violence against women can only be accomplished for *all* women if we move away from an essentialistic approach to their experiences and identities, and adopt a model that can account for differences in context and identity, that can comprehend how stereotypes can be compounded to create a different output that burdens particular women in particular ways, and that can assess how underlying structures of oppression can multiply and subordinate

[167] *Gonzalez, supra* note 2 at 542.

specific women or groups of women in particular ways. It is hoped that the Anti-Essentialist Framework, presented here, might also assist with the crafting of more adequate remedies, built to eradicate discrimination and violence against women for women of all walks of life throughout the Americas.

Bibliography

TREATIES

Organization of American States, *American Convention on Human Rights*, "Pact of San Jose", Costa Rica, 22 November 1969.

Organization of American States, *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ("Convention of Belém do Para"),* 9 June 1994.

United Nations General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331.

JURISPRUDENCE

Barrios Altos (Chumbipuma Aguirre et al. v. Peru) (Reparations), Inter-Am. Ct HR, 30 November 2001, Ser. C, No. 87.

Factory at Chorzów (Merits), 1928 PCIJ (Ser. A) No. 17 at 29 (13 September).

Gonzalez et al. ("Cotton Field") v. Mexico (2009) Inter-American Court of Human Rights.

Gonzalez et al. ("Cotton Field") v. Mexico (Concurring Opinion of Judge Diego García Sayán) (2009) Inter-American Court of Human Rights.

Kaya v. Turkey, App. No. 22535/93*,* Eur. Ct. H.R. 129 (2000).

Kilic v. Turkey, App. No. 22492/93, Eur. Ct. H.R. 128 (2000).

SECONDARY MATERIAL

Andrews, Penelope, "Making Room for Critical Race Theory in International Law: Some Practical Pointers" (2000) 45 Villanova Law Review 855.

Bond, Johanna E., "International Intersectionality: A Theoretical and Pragmatic Exploration of Women's International Human Rights Violations" (2003) 52 Emory L.J. 71.

Butler, Judith, *Gender Trouble, Feminist Theory, and Psychoanalytic Discourse*, in Feminism/ Postmodernism at 327 (Linda J. Nicholson ed., 1990).

Carrasco, Enrique R., Chair, "Implementation, Compliance and Effectiveness: International Dimensions of Critical Race Theory", (1997) 91 Am. Soc'y Int'l L. Proc. 408.

Collins, Patricia Hill, "African-American Women and Economic Justice: A Preliminary Analysis of Wealth, Family, and African-American Social Class" (1997) 65 U. Cin. L. Rev. 825.

Cook, Rebecca J., & Cusack, Simone, *Gender Stereotyping: Transnational Legal Perspectives*, (Pennsylvania: University of Pennsylvania Press, 2010).

Crenshaw, Kimberlé, "Demarginalizing the Intersection of Race and Sex: a Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" (1989) U. Chi. Legal F. 139.

Crenshaw, Kimberlé & Gotanda, Neil, et al., eds., *Critical Race Theory: The Key Writings that Formed the Movement* (New York: The New Press, 1995).

Grillo, Trina, "Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House *Symposium: Looking to the 21st Century: Under-Represented Women and the Law*" (1995) 10 Berkeley Women's L.J. 16.

Halperin-Kaddari, Ruth, *Women in Isreal: A State of Their Own* (Philadelphia: University of Pennsylvania Press, 2004).

Harris, Angela P., "Race and Essentialism in Feminist Legal Theory" in Adrien Katherine Wing, ed., *Critical Race Feminism: A Reader* (New York: New York University Press, 1997) 11.

Higgens, Tracey E., "Anti-Essentialism, Relativism, and Human Rights" (1996) 19 Harv. Women's L.J. 89.

Kapur, Ratna, "Tragedy of Victimization Rhetoric: Resurrecting the "Native" Subject in International/Post-Colonial Feminist Legal Politics" (2002) 15 Harv. H.R.J. 1.

Moreau, Sophia R., "The Wrongs of Unequal Treatment" (2004) 54 University of Toronto Law Journal 291.

Otto, Dianne, "Lost in Translation: Re-scripting the Sexed Subjects of International Human Rights Law," in Anne Orford, ed., *International Law and its Others* (Cambridge: Cambridge University Press, 2006) 318.

Pasqualucci, Jo M., *The Practice and Procedure of the Inter-American Court of Human Rights*, (Cambridge: Cambridge University Press, 2003).

Simmons, William Paul, "Remedies for the Women of Ciudad Juárez through the Inter-American Court of Human Rights" (2006) 4 Northwestern Journal of International Human Rights 492.

Whiteman, Marjorie, *Damages in International Law* (Government Printing Office, Washington DC, 1937).

OTHER MATERIAL

Comisión Nacional de los Derechos Humanos (México), *Recomendación 44/1998* issued on May 15, 1998.

Human Rights Council, *Civil and Political Rights, Including Questions of: Disappearances and Summary Executions; Visit to Mexico*, UN Doc. E.CN.4/2002/3/Add.3 (1999) (prepared by Special Rapporteur on extrajudicial, summary or arbitrary executions, Ms. Asma Jahangir).

Inter-American Commission on Human Rights, *Access to justice for women victims of violence in the Americas,* OEA/Ser.L/V/II. Doc. 68,January 20, 2007.

Inter-American Commission on Human Rights, *The Situation of the Rights of Women in Ciudad Juárez, Mexico: The Right to be Free from Violence and Discrimination,* OEA/Ser.L/V//II.117, Doc. 44, March 7, 2003.

Inter-American Commission on Human Rights, *Violence and Discrimination Against Women in the Armed Conflict in Colombia*, OEA/Ser.L/V/II., Doc. 67, October 18, 2006.

Organization of American States, *Draft American Convention on Protection of Human Rights,* OAE/Ser.L/II.19doc. 48 (English) rev. 1 (2 October 1968), reprinted in Buergenthal and Norris (eds.), *Human Rights: The Inter-American System*, booklet 13, vol. 2.

Organization of American States, *Observations by the Governments of the Member States on the Draft Inter-Amercian Convention on Protection of Human Rights: Guatemala*, OEA/Ser.K/XVI/1.1doc.24 (English) (8 November 1969), reprinted in Buergenthal and Norris (eds.), *Human Rights: The Inter-American System*, Booklet 13, vol. 2.

United Nations Committee on the Status of Women, *Agreed Conclusions on Gender and all forms of Discrimination, in Particular Racism, Racial Discrimination, Xenophobia and Related Intolerance* 45th Session.

United Nations, *Report of the mission of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, E/CN.4/2000/3, Add.3, November 25, 1999.